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UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

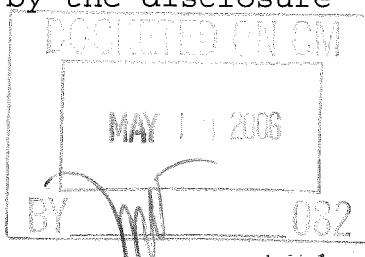
## SOUTHERN DIVISION

UNITED STATES OF AMERICA, ) Case No. SA CR 05-36-JVSS

Plaintiff, ) EX PARTE APPLICATION FOR AN  
.) ORDER PERMITTING RELEASE OF  
.) GRAND JURY TRANSCRIPT;  
.) MEMORANDUM OF POINTS AND  
.) AUTHORITIES; DECLARATION OF  
.) BRENT G. TABACCHI

Defendant.

21 Plaintiff United States of America, by and through its  
22 attorney of record, the United States Attorney's Office for the  
23 Central District of California, applies ex parte for an order  
24 pursuant to Rule 6(e)(3)(E)(i) of the Federal Rules of Criminal  
25 Procedure, authorizing the government to provide counsel of  
26 record for the defendant in this case a copy of the grand jury  
27 testimony of a witness whom the government intends to call at  
28 trial. This application is necessitated by the disclosure



1 provisions of the Jencks Act, Title 18, United States Code  
2 § 3500, and is based on the accompanying memorandum of points and  
3 authorities and declaration of Brent G. Tabacchi, on the files  
4 and records of this case, and on such further evidence and  
5 argument as may be presented at any hearing on this application.

6 DATED: May 1, 2006

Respectfully submitted,

7 DEBRA WONG YANG  
United States Attorney

8 WAYNE R. GROSS  
9 Assistant United States Attorney  
Chief, Santa Ana Branch

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11 BRENT G. TABACCHI  
12 Assistant United States Attorney

13 Attorneys for Plaintiff  
14 United States of America

1                   **MEMORANDUM OF POINTS AND AUTHORITIES**

2                   Pursuant to Federal Rule of Criminal Procedure 6(e) ("Rule  
 3 6(e)"), the government seeks an order from this Court permitting  
 4 disclosure of certain grand jury testimony to defendant's counsel  
 5 prior to the trial in this case. As a general proposition, Rule  
 6 6(e) prohibits "an attorney for the government" from  
 7 "disclos[ing] a matter occurring before the grand jury." Rule  
 8 6(e) (2) (B) (vi). Upon the government's motion, however, "the  
 9 court may authorize disclosure--at a time, in a manner, and  
 10 subject to any other conditions that it directs--of a grand jury  
 11 matter . . . preliminarily to or in connection with a judicial  
 12 proceeding." Rule 6(e) (3) (E) (i). The district court's power to  
 13 order disclosure is discretionary and may be exercised when  
 14 "compelling necessity" outweighs the countervailing policy of  
 15 grand jury secrecy. United States v. Proctor & Gamble Co., 356  
 16 U.S. 677, 682 (1958); In re William H. Pflaumer & Sons, Inc., 53  
 17 F.R.D. 464, 470 (E.D. Pa. 1971). However, when the policy  
 18 reasons underlying secrecy<sup>1</sup> "do not apply [to] a given situation,  
 19 or apply to only an insignificant degree, the party seeking

20  
 21                   <sup>1</sup> The Ninth Circuit has recognized five policy  
 22 considerations underlying the need for grand jury secrecy: "(1)  
 23 to prevent the escape of those whose indictment may be  
 24 contemplated; (2) to insure the utmost freedom to the grand jury  
 25 in its deliberations, and to prevent persons subject to  
 26 indictment or their friends from importuning the grand jurors;  
 27 (3) to prevent subornation of perjury or tampering with the  
 28 witnesses who may testify before the grand jury and later appear  
 at the trial of those indicted by it; (4) to encourage free and  
 untrammeled disclosures by persons who have information with  
 respect to the commission of crimes; and (5) to protect the  
 innocent accused who is exonerated from disclosure of the fact  
 that he has been under investigation." U.S. Ind., Inc. v. United  
States Dist. Ct., 345 F.2d 18, 21 (9th Cir. 1965).

1 disclosure should not be required to demonstrate a large  
2 compelling need" for the grand jury testimony. U.S. Industries,  
3 Inc. v. United States District Court, 345 F.2d 18, 21 (9th Cir.  
4 1965).

5 In this case, the policy considerations that warrant grand  
6 jury secrecy do not counsel against disclosure of the  
7 transcripts. Most notably, defendant already has been indicted  
8 in this case.

9 In contrast, compelling reasons justify an order permitting  
10 disclosure of the grand jury testimony. In particular, the  
11 Jencks Act, 18 U.S.C. § 3500, requires the government to "produce  
12 any 'statement' in its possession of a witness it has called  
13 which relates to the subject matter of which the witness has  
14 testified . . . includ[ing] a transcript of a witness's testimony  
15 before a grand jury." United States v. Knowles, 594 F.2d 753,  
16 755 (9th Cir. 1979). Here, during its case-in-chief in these  
17 proceedings, the government may call as a witness an individual  
18 who testified before the grand jury that indicted this matter.  
19 Thus, to permit the government to comply with its obligations  
20 under the Jencks Act and to promote the interests of justice by  
21 allowing defense counsel an opportunity to review the requested  
22 materials prior to trial, the court should permit the government  
23 to disclose the grand jury testimony in this case to defense  
24 counsel. See United States v. Kerr, 981 F.2d 1050, 1052 (9th  
25 Cir. 1992) (concluding that government complied with Jenck's  
26 obligations by turning over to defendant grand jury statements of  
27 government witnesses).

28 However, the government requests that defense counsel and

1 defendant be ordered (a) not to disclose the grand jury testimony  
2 except as necessary in preparation of the defense, and (b) to  
3 supply a copy of the court's order permitting disclosure (and  
4 restricting use of the disclosed grand jury testimony) to anyone  
5 to whom they disclose the grand jury testimony.

6 DATED: May 1, 2006

Respectfully submitted,

7 DEBRA WONG YANG  
United States Attorney

8 WAYNE R. GROSS  
9 Assistant United States Attorney  
Chief, Santa Ana Branch

10   
11 BRENT G. TABACCHI

12 Assistant United States Attorney

13 Attorneys for Plaintiff  
14 United States of America

**DECLARATION OF BRENT G. TABACCHI**

I, Brent G. Tabacchi, hereby declare as follows:

3       1. I am an Assistant United States Attorney for the  
4 Central District of California. In that capacity, I represent  
5 the government in United States v. Ketner, No. CR 05-36-JVS.

6           2. This Court has scheduled trial in this case for May 30,  
7 2006.

8       3. I anticipate that the government may call during trial  
9 one witness who testified before the grand jury during its  
10 investigation of this case. Such testimony constitutes a  
11 "statement" within the ambit of the Jencks Act, 18 United States  
12 Code, § 3500, which the government is required to provide to the  
13 defense.

14 I declare under penalty of perjury that the foregoing is .  
15 true and correct.

16 Executed on May 1, 2006, in Santa Ana, California.

Brent G. Tabacchi  
BRENT G. TABACCHI

1                   **CERTIFICATE OF SERVICE BY MAIL**

2       I, **REBECCA SATO**, declare: That I am a citizen of the United  
3 States and resident or employed in Orange County, California; that  
4 my business address is United States Attorney's Office, 411 West  
5 Fourth Street, Suite 8000, Santa Ana, California 92701; that I am  
6 over the age of eighteen years, and am not a party to the above-  
7 entitled action;

8       That I am employed by the United States Attorney for the  
9 Central District of California, who is a member of the Bar of the  
10 United States District Court for the Central District of California,  
11 at whose discretion the service by mail described in this  
12 Certificate was made; that on May 1, 2006, I deposited in the United  
13 States Mails, United States Attorney's Office, 411 West Fourth  
14 Street, Suite 8000, Santa Ana, California 92701 in the above-  
15 entitled action, in an envelope bearing the requisite postage, a  
16 copy of:

17                   **EX PATE APPLICATION FOR AN ORDER PERMITTING RELEASE OF GRAND  
18 JURY TRANSCRIPT; MEMORANDUM OF POINTS AND AUTHORITIES;  
DECLARATION OF BRENT G. TABACCHI**

19 addressed to:

20                   **SEE ATTACHMENT**

21 at their last known address, at which place there is a delivery  
22 service by United States Mail.

23       This Certificate is executed on May 1, 2006, Santa Ana,  
24 California. I declare under penalty of perjury that the foregoing  
25 is true and correct.

26                     
27                   REBECCA SATO  
28

1 Service List  
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3 Benjamin Nathan Gluck  
4 Bird, Marella, et al.  
5 1875 Century Park East, 23rd Fl.  
6 Los Angeles, CA 90067  
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